Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petition for Rulemaking	)	WT Docket No. 01-72
Of the Cellular Telecommunications	)	
Industry Association	)	

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

To the Commission:

Pursuant to the Public Notice the Federal Communications Commission ("FCC" or "Commission") issued on March 16, 2001, The Direct Marketing Association ("The DMA") submits these comments in response to the Petition for Rulemaking filed by the Cellular Telecommunications Industry Association ("CTIA").

The DMA is the principal trade organization representing companies and organizations that rely upon various forms of direct marketing vehicles as a means of offering products and services to the American public. The DMA has over 4700 member companies, ranging in size from Fortune 500 companies to small non-profit charitable organizations. Electronic communications – including telephone, television, multi-channel video distribution systems, and the Internet – are all key means through which The DMA's members communicate with consumers throughout the United States and abroad.

The DMA commends CTIA's efforts to promote meaningful industry self-regulation through its own adoption of the "fair location information principles" described in its petition. The DMA also has a long history of encouraging fair marketing practices through the development of industry guidelines for its members. In particular, as the largest trade association for database and interactive marketers, The DMA has taken a leadership role in formulating policies for the collection, use, storage, and exchange of personal information in a responsible manner that protects individual privacy while still allowing access to information for legitimate marketing purposes.

The DMA's Privacy Promise to American Consumers went into effect on July 1, 1999, and its requirements include providing notice to customers on how marketing information may be used by other marketers; offering customers the opportunity to opt out of other uses of their marketing information; honoring individual consumer requests not to receive future solicitations; and using The DMA's nationwide name-removal services, the Mail Preference Service, the Telephone Preference Service, and the E-Mail Preference service when prospecting for new customers. All member organizations marketing to consumers and their suppliers must sign the Privacy Promise. All organizations complying with the Privacy Promise can display The DMA Member logo, a recognizable "seal" that assures consumers of a company's commitment to privacy protection.

The DMA's *Guidelines for Ethical Business Practice* is another example of the association's long-standing policy of promoting high levels of ethics and the responsibility of the members to maintain consumer relationships that are based on fair and ethical principles. In addition to providing general guidance to the industry on

generally accepted principles of conduct, the *Guidelines for Ethical Business Practice* are used by The DMA Committee on Ethical Business Practice, an industry peer review committee, as the standard for evaluating consumer complaints regarding marketing promotions. All association members are required to follow the guidelines and can be subject to censure and expulsion for failure to comply with them.

The DMA believes that industry self-regulation generally is more effective than cumbersome and inflexible government rules for promoting responsible, ethical, and fair business practices as well as for addressing consumer concerns. This is especially true for standards affecting emerging and growing communications sectors: They demand a nimble and flexible approach to fast-paced changes in technology, competition, and other market factors without stifling the creativity, innovation, and economic viability of new technologies. Self-regulation also avoids or ameliorates the constitutional issues that arise when the FCC or any agency attempts to prescribe speech.

In light of the regulations that already govern the use of and access to customer proprietary network information ("CPNI"), The DMA questions the necessity of initiating a rulemaking concerning the use of location information. As required by the Telecommunications Act of 1996, the Commission adopted comprehensive rules governing the use of CPNI and other telecommunications customer information.[1/] Customer information is afforded different levels of protection, and triggers different

---

1/ *See, e.g.*, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Third Report and Order*, 14 FCC Rcd. 15550 (1999); Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409 (1999); Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061 (1998).

carrier obligations, depending upon whether the information is "CPNI," "aggregate customer information," or "subscriber list information."[2/] Under these rules, carriers may use CPNI without customer approval to market offerings that are related to a customer's existing service relationship with their carrier, or to market equipment that is necessary to, or used in, the provision of such services. With respect to other uses of CPNI, carriers must obtain customer approval before they may use the data or share it with third parties. The Commission's original requirement to use an "opt-in" procedure to obtain customer consent was ruled unconstitutional,[3/] but the rules otherwise remain in effect. The Wireless Communications and Public Safety Act of 1999 amended the definition of CPNI to include "location"[4/] and provided that except in limited situations, commercial mobile service users may not be considered to have approved the use or disclosure of, or access to location information without the users' prior express authorization.[5/] Carriers also remain obligated to disclose location CPNI to any person a customer designates on the customer's affirmative written request.[6/] Thus, since there is already a detailed regulatory framework governing CPNI, The DMA believes that *additional* standards are unnecessary.

The Commission can and should give safe harbor treatment to carriers that elect to adhere to industry guidelines that have been approved by the FCC, and the CTIA policies can and should be considered as a candidate for safe harbor consideration. There

---

2/ *See generally* 47 U.S.C. § 222.

3/ *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

4/ 47 U.S.C. § 222(h).

5/ *Id.* at § 222(f).

6 *Id.* at § 222(c)(2).

are many ways that businesses can comply with government regulations. Providing safe-harbor treatment to industry principles and guidelines such as those advanced by CTIA helps foster greater certainty of widespread compliance to industry, consumers, and regulators alike.

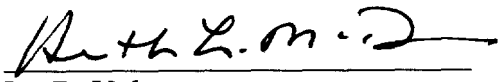
Nevertheless, the Commission must make clear from the outset of such a proceeding that adherence to industry principles or guidelines is not the *sole* means by which carriers may comply with laws and regulations administered by the Commission. CTIA suggests that "failure to implement the safe harbor principles could subject carriers to enforcement actions under the Commission's rules."[7/] The intent of CTIA's statement is somewhat unclear. The DMA believes that, if a carrier certifies or otherwise represents that it is complying or will comply with Commission-endorsed industry guidelines, but in fact fails to do so, that carrier would and should be subject to liability under FCC rules. On the other hand, if a service provider elects not to subscribe to CTIA's principles, but its conduct otherwise complies with the requirements of the Communications Act, the Commission's existing rules, and, of course, the Constitution, the provider should not be subject to liability simply because it elected to comply outside the CTIA or other self-regulatory framework. It is imperative that the Commission make this clear at the very start of any proceeding to consider CTIA or other industry guides; before interested

---

7 Petition of the Cellular Telecommunications Industry Association for a Rulemaking to Establish Fair Location Information Practices at 8, n.21, WT Docket 01-72, November 22, 2000 ("*CTIA Petition*").

parties are called to comment on the substance of any industry standards, the Commission must clarify the reach – and limits – of such a proposal.

Respectfully submitted,



Ian D. Volner
Heather L. McDowell
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, NW
Suite 1000
Washington, DC 20005
202.962.4800
202.962.8300 (fax)
Counsel for The Direct Marketing Association

April 6, 2001